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IN THE

Supreme Court of the United States

October Term, 1967.

No. 405.

POWELL

v.

TEXAS.

On Writ of Certiorari to the County Court of Travis, Texas.

MOTION OF PHILADELPHIA DIAGNOSTIC AND RELOCATION SERVICES CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF PHILADELPHIA DIAGNOSTIC AND RELOCATION SERVICES CORPORATION AS AMICUS CURIAE.

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ON WRIT OF CERTIORARI TO THE COUNTY COURT OF TRAVIS, TEXAS.

MOTION OF PHILADELPHIA DIAGNOSTIC AND RELOCATION SERVICES CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The Philadelphia Diagnostic and Relocation Services Corporation respectfully moves this Court for leave to file the attached brief in this case as *amicus curiae*, consent to the filing of a brief by the Diagnostic Corporation not having been obtained.

The applicant, Philadelphia Diagnostic and Relocation Services Corporation, has an interest in this case by virtue of its role as a non-profit, government-supported social agency engaged in the treatment and study of the class of persons represented by petitioner.

Specifically, the Diagnostic Corporation (together with its predecessor, the Diagnostic and Relocation Center) has since April 1963 operated a program which consists of providing services to Philadelphia's skid row population and investigating the two phenomena of skid row: the individ-

ual and the institution of skid row. Because a significant proportion of the skid row population are chronic alcoholics and because these men also represent, as a class, the most numerous violators of the public intoxication laws, both the service and research facets of the Diagnostic Corporation have been much concerned with the matter now before the Court.

Based on its accumulated experience, the Diagnostic Corporation has concluded that treating the chronic alcoholic as a criminal has a negative effect on the overall community effort to deal in a meliorative way with the social and individual problems posed by the skid row alcoholic. It is the Diagnostic Corporation's concern, as an involved agency, with the development of more effective and more humane community approaches for controlling and remedying the social malady exemplified by petitioner, that identifies its interest in this case.

The case law applicable to petitioner's case is well known, and the Diagnostic Corporation is certain that it will be amply briefed by the parties. However, the Diagnostic Corporation is in a unique position to present to the Court the sociological insights derived from pragmatic experience that are relevant to a resolution of the legal issues.

Situated as it is both professionally and geographically in the midst of the population providing the lion's share of persons arrested for public intoxication, the Diagnostic Corporation is uniquely qualified to furnish the Court with this pertinant information. Factual matters relevant to dispostion of this case have been explored in great depth by the Diagnostic Corporation and the results have been or are awaiting to be published in numerous periodic reports. Notable among these reports are the following: an examination of the role of law enforcement in relation to the skid row man, Blumberg, et al., *The Homeless Man and Law Enforcement Agencies*, 45 PRISON JOURNAL 29 (1965); the technical report contracted for by the Depart-

ment of Housing and Urban Development relating the findings of the initial three year study of the skid row male; and the results of a ten-day pilot project testing non-penal procedures for dealing with public intoxicants.

Results of the general studies of the skid row population bear relevance to a) an understanding of the syndrome of the chronic alcoholic, b) the effects of criminal disposition on that person, and c) the possibility of efficacious alternatives for dealing with the problem. These considerations have significance in this case insofar as the data compiled by the Diagnostic Corporation tend to show that the chronic alcoholic does not voluntarily violate the drunkenness laws, that law enforcement is unsuitable as a remedy from the standpoint of society and the alcoholic, and that the assertion that penal incarceration is the only resort for the chronic alcoholic is erroneous.

It is believed that the ten-day pilot project conducted by the Diagnostic Corporation and noted above is especially relevant to a decision herein. The project was undertaken with the cooperation of the Philadelphia Police Department and District Attorney in response to the decision in the Philadelpia Court of Common Pleas that habitual intoxication may not be made a criminal offense. *Commonwealth ex rel. Lee v. Hendrick*, — D. & C. — (Phila. 1967).

The results of the project indicate that it is both feasible and desirable from the standpoint of the chronic alcoholic, the police, and the community-at-large to administer a program for the control of public drunkenness apart from customary law enforcement channels. This finding implies that a decision favorable to petitioner need not create greater problems than it solves.

If the foregoing arguments are approved by this Court, the decision of the court below must be reversed.

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BRIEF OF PHILADELPHIA DIAGNOSTIC AND RELOCATION SERVICES CORPORATION AS AMICUS CURIAE.

By leave of this Court, the Philadelphia Diagnostic and Relocation Services Corporation files this brief as *amicus curiae.*

INTEREST OF THE AMICUS CURIAE.

The *amicus curiae,* Philadelphia Diagnostic and Relocation Services Corporation, has an interest in this case in that its primary function involves the treatment and study of the skid row alcoholic, the class of persons who will be most affected by a decision herein. In its capacity as a diagnostic and relocation service agency, *amicus* is concerned that the skid row alcoholic be rescued from the margins of society and be restored to a state of human dignity.

As a research program, *amicus* believes that its expertise and specialized experience as respects the subject matter enable it to furnish the Court with sociological data and insights that may be of aid in arriving at a proper disposition of the legal question of whether chronic alcoholism is a defense to a charge of public intoxication.

SUMMARY OF ARGUMENT.

Subjecting the chronic alcoholic to criminal penalty for public intoxication is incompatible with the objectives of criminal law and fails to comport with modern sociological approaches to the homeless inebriate upon whom the penalty most frequently falls. Effective alternatives to punishing the alcoholic offender have succeeded in practice to the benefit of the alcoholic, the police, and the community-at-large.

ARGUMENT.

It is *amicus's* contention that the prevailing system of penalizing the chronic alcoholic who commits the offense of public intoxication cannot be reconciled with the purposes of law enforcement and criminal justice nor justified by a rational social policy. *Amicus* intends to show that whatever social interests are allegedly served by making the alcoholic a criminal are ultimately defeated in the same process. The final purpose of this brief is to demonstrate that the consequences of a ruling favorable to petitioner will be to alleviate rather than aggravate the enormous social problem dramatised by this case.

The strikingly disproportionate number of arrests for drunkenness nationally in relation to the number of arrests for all offenses has been widely commented upon. See e.g., The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 233 (1967) wherein it is reported that one-third of all arrests in 1965 were for drunkenness. In urban centers including among their population numbers of homeless men residing in decayed surroundings commonly referred to as "skid rows" or words of like effect, the proportion of drunkenness arrests to all others is most pronounced.

Figures for Philadelphia indicate that over a period of years this proportion appoaches fifty percent. Philadelphia Police Department, Statistical Report 1965, 16 (1966). San Francisco, to take just one more example, reports comparable statistics. See Levin, *The San Francisco Court School for Alcoholism Prevention,* 53 A. B. A. J. 1043 (1967). The very improbability of these figures constitutes a reproach to the national community and challenges the efficacy of existing programs which society's institutions, including the law, have responded with to implement the condemnation of public drunkenness.

Explanation for the extraordinary number of arrests for the crime of public intoxication lies with the nature of its most prevalent offender, the chronic alcoholic living on the fringe of society. Although the skid row alcoholic comprises but a fraction—perhaps two to three percent based on the evidence in Philadelphia—of an estimated alcoholic population of five million persons in the United States, see Roche Laboratories, *Aspects of Alcoholism* 30 (1963), his homelessness and abject appearance make him highly visible and thereby uniquely prone to the snare of law enforcement.

Of the upwards of 40,000 arrests annually in Philadelphia for drunkenness, nearly one-quarter are reported by the police district in which the City's skid row is located although the district contains but two percent of the City's total population. Nolan, A Report on Alcoholism (Appendix II) (Unpublished Study presented to the Penna. Crime Commission Special Offenses Task Force, October 20, 1967). That a relatively small and discrete class of persons can be responsible for a staggering number of offenses is accounted for by the high rate of recidivism among the class of drunkenness offenders. Police and magistrates dealing with the public intoxicant on a daily basis have long been aware of this fact, but it has rarely been documented.

A review of drunkenness arrests for the first seven months of 1967 in the Philadelphia police district having the largest incidence of such arrests indicated that more than fifty percent of those arrested experienced more than one arrest for drunkenness during this brief time span. Ten or more arrests of the same person were not uncommon, and a few unfortunates appear to have been arrested on at least a weekly basis. *Id.* A recently completed ten-day pilot project undertaken by *amicus* in this same district in cooperation with the Philadelphia Police Department and District Attorney for the purpose of evaluating non-penal procedures for the handling of drunkenness offenders, produced corroborative data. Many of those

individuals identified by medical and psycho-social diagnoses as alcoholics reported a history of fifty or more arrests for drunkenness.

This information is relevant for the purpose of showing that the gross prevalence of the crime of public intoxication is largely attributable to a group which may be characterized as homeless or skid row alcoholics. This fact in turn raises questions as to the legitimacy of applying criminal sanctions to a person who, by definition, is incapable of avoiding the proscribed conduct, is undeterred by the threat of punishment, and whose debility is aggravated by society's reliance on police restraint of his behavior.

The skid row (as distinguished from his more affluent counterpart) alcoholic tends to be guilty of repeated violations of the drunkenness law because he is afflicted with a disorder that compels his drinking to intoxication—a fact found by the court below in consonance with virtually all medical opinion—and because his pattern of life dictates a high exposure to public view.

What causes a person to become an alcoholic is an unresolved controversy, but it is clear that a society which condones and in many circumstances encourages the use of alcohol, impliedly accepts the risk of producing in those who are susceptible, for whatever combination of physiological or psychological factors, a state of alcohol addiction. It begs reality to hold the alcoholic culpable for the symptoms of his addiction on the ground that his conduct was voluntary in the first instance of his consuming alcohol. If the consequences are unforeseeable, one may not be held to account for doing what is socially expected.

The skid row alcoholic manifests the customary symptoms of the addiction: the psychic compulsion to drink, the development of physiological tolerance creating the need for increased quantities to satisfy the body's craving, and the agonizing withdrawal when the craving is unsatisfied.

In addition to these symptoms common to all alcoholics, the derelict who is so afflicted displays a range of infirmities altogether pathetic.

Typically, the skid row alcoholic is over fifty years of age and has had a long drinking history marked in its advanced phases by the consumption of non-beverage alcohol such as canned heat, blackouts, convulsions, and fits of delirium tremens. His characteristically scrofulous demeanor is the result of the malnutrition brought on by an exclusively liquid diet. In this debilitated condition he is vulnerable to a host of diseases, many all but eradicated in the general population; nine percent of the men arrested in the course of the pilot project had a history of tuberculosis. Despite his organicity he is as likely to be killed by an automobile as from all other causes of death.

When the derelict is sheltered at all, it is in the meanest of accommodations, and refuge may just as frequently be sought in the doorway, the parked vehicle, the condemned building, and the alley. He is prey to beatings when drunk and to other forms of exploitation even when sober at the hands of the parasitic components of the skid row environment who profit from the perpetuation of his degradation. His employment history is irregular, and the periods of unemployment lengthen with the hardening of the addiction. Psychologically, his personality is inadequate to the point of being shattered, divesting him of the will to regain a measure of dignity.

The point to be made by this rendering is that the skid row alcoholic desperately requires some measure of institutional control for his own protection. Obversely, the community needs protection from the downtrodden alcoholic who poses a threat of injury to the vehicle operator, a nuisance and sometimes worse to the pedestrian, and a general offense to public sensibilities. *Amicus* does not question society's right in these circumstances to adopt those measures which are necessary to prevent the injurious con-

duct, notwithstanding the fact that it flows from an involuntary status. What is in issue is whether law enforcement is an appropriate instrument for discharging this function.

Measured against the traditional objectives of the criminal law, the only arguable justification for the imposition of criminal penalties on the chronic alcoholic is the protection afforded his person and society while he is confined. Of deterrant value there can be none operating upon an agent who lacks self-control in relation to the consumption of alcohol. The recidivism rate among the alcoholic population evidences the ineffectuality of the threat of punishment for reducing their commissions of public intoxication.

As respects the thesis that the protection afforded all parties justifies penal incarceration of the chronic alcoholic, it is submitted that the immediate value of short-term confinement is achieved at the expense of perpetuating the need for protection. Whatever safety is gained by jailing the alcoholic is transient, lasting only as long as the confinement itself. Upon his release, the alcoholic recommences the cycle of drinking, inebriation, and helplessness. The intervention of law enforcement merely adds an additional phase to the cycle, a phase without claim to remedial value except insofar as it postpones the consequences it is inoperative to deter.

The application of criminal sanctions against the alcoholic for the involuntary display of his symptoms is at variance with traditional norms of criminal law in the further respect that in order to convict the alcoholic, a court suspends, in effect, the common law requirement that conduct be bottomed by the actor's volition. It is precisely the loss of the volitional capacity in relation to the use of alcohol that defines the alcoholic's disability; convicting the alcoholic for being intoxicated is analogous to punishing a senile person for being incontinent and equally bereft of fairness.

The negative affect on the alcoholic of jailing him and labeling him a criminal is not offset by the temporary benefit he derives from the food and shelter provided at the state's expense. This is not to minimize the humane service provided by the police and prisons, frequently the skid row alcoholic's sole source of care. It is to say that in focusing on the beneficial aspect of penal confinement, the tendency is to overlook its unfortunate ramifications which may be to reinforce feelings of self-contempt thereby insuring the permanency of the skid row way of life. In the words of one scholar,

> The constantly incarcerated individual finds it nearly impossible to maintain a meaningful marital and family relationship; his ability to find employment is seriously jeopardized by his arrest record. . . . By constantly being officially labeled by the police, the courts and correctional institutions as a public drunk, he begins to see himself as a public drunk; the jail becomes little more than a shelter to regain his physical strength.

Pittman, *Public Intoxication and the Alcoholic Offender in American Society,* attached as Appendix A to President's Commission on Law Enforcement and Administration of Justice, the Challenge of Crime in a Free Society—Task Force Report: Drunkenness 10 (1967).

The act of conferring a right on the police to arrest the skid row alcoholic as a criminal lends itself to an interpretation in the public mind that responsibility for the welfare of the derelict also rests with the police. As a result, society has tended to abnegate its responsibility to improve the lot of this stricken group. The availability of the criminal expedient has thereby had the incidental consequence of reducing the pressure for needed research in this area and the establishment of adequate treatment facilities. Not only is the alcoholic's disability exacerbated by subjecting him to criminal sanctions, but his prospects

for eventual treatment and recovery are also diminished by resort to law enforcement.

The police are not without a function to play in the field of public health. As guardians of society, they are as fitted in some circumstances to protect the community from the harmful consequences of disease as from those of conscious wrongdoing. For this reason the police are empowered to take into custody carriers of serious contagious diseases. Such persons are hospitalized, however, and not jailed. A similar approach might well be appropriate for the disposition of the alcoholic who endangers public safety, and civil commitment procedures may be suited or adopted to this end.

But for the limited purpose just described, the agencies of law enforcement are unsuited for the role of public health officers which existing practice thrusts upon them. The police are neither trained nor equipped to administer to sick persons, or, more critically perhaps, to know when a person is in need of medical care as opposed to merely being intoxicated. A recent incident in Philadelphia wherein an alcoholic offender died in the "drunk tank" of a local police station is noteworthy not because it exposes police irresponsibility, but because it exemplifies police limitations and the frustrations to which they are heir so long as they are cast in the role of caretaker to the publicly intoxicated alcoholic. Policemen in districts having a high incidence of drunkenness who must arrest the same individuals on virtually a nightly basis can only be aggrieved by the enormous quantities of time and manpower diverted from normal police functions into what is essentially the field of public health. For a police officer's view, see Nolan, *supra* at 17, where he estimates that 60,000 man hours were lost in Philadelphia during the first seven months of 1967 to the arrest and processing of drunkenness offenders.

In light of the foregoing, the only remaining justification for persisting in the present course of relegating responsibility for the alcoholic to law inforcement would be

the absence of efficacious alternatives; such is the claim of those who maintain that incarceration is the only recourse for dealing with the skid row alcoholic. This attitude is belied by the experience of practitioners. The alcoholic, and particularly the skid row alcoholic, is not easily treated nor is recovery easily come by; yet, with proper therapy and sufficient support substantial improvement and recovery are attainable. In the irremediable case, the only solution may be commitment to a long-term facility much as it is the only solution in cases of extreme mental illness.

Herein, the four and one-half years experience of the Philadelphia Diagnostic and Relocation Services Corporation is enlightening. Originally conceived for the purpose of complementing the physical renewal of downtown Philadelphia with a program of human renewal for the homeless men displaced by urban redevelopment, the Diagnostic Corporation (then Diagnostic Center) quickly realized that treatment for alcoholism was a prerequisite for effectively servicing and relocating this population.

A program for rehabilitating alcoholics was devised utilizing thorough diagnostic and evaluative services—medical, psychological, and, psychiatric—counselling by personnel trained and experienced in helping the alcoholic, a Halfway House program currently in the process of expansion, and referrals to the Eagleville Hospital and Rehabilitation Center, a facility offering long-term treatment for alcoholics developed in 1966 with the active support of the Diagnostic Corporation.

A major contributant to the success of the program has been the procedure of using recovered alcoholics in a "contact" capacity; their ability to gain the confidence of the alcoholic and their status as living examples of the possibility of recovery are of immeasurable importance in initiating treatment. A number of persons who have been through the program have subsequently been employed by the Diagnostic Corporation in various capacities, evidence of the possibility of reintegrating the alcoholic into the com-

munity in a productive capacity. Provision of vocational training and aid in finding employment are services designed to further this objective.

Financing of the broad range of services offered by the Diagnostic Corporation has been achieved largely through Federal and State funding. It appears that existing programs may be drawn upon for financing local efforts in alcohol treatment, meaning that their development need not be contingent on the creation of wholly new sources of revenue.

A relevant consideration in resolving the issue at hand is the likely effect of a decision favorable to petitioner. Should such a decision be thought to result in greater social dislocation than its remedies, its propriety might be doubtful. The recent experience of Philadelphia in the wake of a judicial ruling that it is constitutionally impermissible to convict for the crime of habitual intoxication, *Commonwealth ex rel. Lee v. Hendrick*, — D. & C. — (Phila. 1967), is pertinent to this inquiry.

The initial reaction in the community to the court decision was the determination by responsible officials that the supervision and welfare of the publicly intoxicated alcoholic were matters of community concern. To implement this judgment, the Philadelphia Police Department and District Attorney assumed the lead in searching out alternatives to criminal punishment that would still serve to promote public safety and that of the alcoholic.

With the financial support of a civic organization, the Greater Philadelphia Movement, a pilot program was established at the police district located within skid row, the purpose of the program being to evaluate the needs of the alcoholic population subject to police arrest in relation to community resources, and to determine the administrability of non-penal procedures. The mechanics of the project involved police pickup of individuals publicly intoxicated followed by a screening process whereby doctors and alcohol specialists determined which persons were suffering from

alcoholism. Those who were in need of immediate medical care were hospitalized where they could be detoxified; others were provided shelter where they could "sleep off" the effects of inebriation; and all were offered follow-up services and treatment by social agencies.

Of the approximately 190 men who were examined during the project, it was found that most suffered illness, acute and chronic, both from the effects of alcoholism and other serious pathology. Nearly one-third required hospital care, ten percent urgently. It was clear that only a trained professional was capable of differentiating those who were in need of medical treatment from others who could be detained or discharged without treatment.

Among the further findings yielded by the study was that hospitals in the community would provide their services in deference to community needs, and that the demands made upon the hospitals were significantly lighter than anticipated and certainly of a manageable quantity. The police attached to the district were gratified by the intercession of medical personnel to relieve the sufferings of those persons whom the police heretofore had been unequipped to care for and the regularity of whose arrests amounted to an unholy and unwelcome ritual. A further benefit produced by the program was that it inspired interest on the part of many of the alcoholics to seek remedial assistance beyond the simple "drying out" process.

The project and others like it are not regarded as panaceas to the problems of the skid row alcoholic; extended treatment and adequate long-term facilities are necessary to achieve that end. But as an alternative to arrest, the program was markedly successful if only because it interrupted the treadmill existence led by the skid row alcoholic and introduced a measure of hopefulness, and because it enabled the police and courts to escape their role of accomplices in the degrading process.

The cost to the individual community entailed by the presence of a significant alcoholic population is severe in

terms of traffic and pedestrian injury, fire and accident losses, the waste of police, judicial, and prison resources, and the burden of maintaining an unproductive group within the community. Visiting the alcoholic with criminal penalties is an expedient that perpetuates these costs and postpones ameliorative efforts. An approach predicated on arresting the illness and not the man, besides being commended by its humaneness, makes possible the ultimate diminution of these social costs at a cost which is itself not prohibitive. The system of punishing the alcoholic for manifesting his illness is seen to be morally indefensible, economically unsound, and socially undesirable.

CONCLUSION.

For the reasons stated above, *amicus* supports petitioner's contention that the judgment be reversed.

Respectfully submitted,

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